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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GILBERT GUZMAN et al. Defendants and Appellants.	H024976 (Santa Clara County Super. Ct. Nos. FF090933, 210642)

INTRODUCTION

On June 22, 2000, 80-year-old Higinio Pequeno, his 78-year-old wife, Guadalupe, and their 47-year-old son, Daniel, were killed when their house was firebombed in the middle of the night. They died from a combination of smoke inhalation and thermal injuries, i.e., burns. The prosecution's theory of the case was that defendants Guzman and Freitas, along with an informant, Rusich, firebombed the house intending to kill David Pequeno, grandson and nephew of the family members who died, because David Pequeno had dated Guzman's ex-girlfriend.

In 2001, all three men were charged with three counts of arson-felony-murder (but not arson). (Pen. Code, §§ 187; 451, subd, (b).)[1] In addition, as to all three counts of murder, each man was charged with two special circumstances: (1) multiple murders and (2) murder in the commission of arson. (§ 190.2, subds. (a)(3) & (a)(17).) In 2002,

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

however, Rusich was permitted to plead guilty to being only an accessory after the fact and was granted immunity from prosecution in exchange for his agreement to testify at Guzman's and Freitas's joint trial. Trial began on June 17, 2002, and ended on July 30, 2002, with guilty verdicts on all three murder counts and true findings on both special circumstance allegations. Defendants were sentenced to three consecutive life sentences without the possibility of parole.

Rusich testified that Guzman intimated to him and Freitas that he wanted something bad to happen to David Pequeno. The three drove by the Pequeno house, then to a convenience store to buy a bottle of beer, and then back to Guzman's cottage where they concocted a firebomb out of the beer bottle and a torn sheet for a wick (referred to as a "Molotov cocktail" in the court's instructions). Guzman stayed at the cottage while Rusich and Freitas filled the bottle with gasoline at a gas station, then drove back to the Pequeno house. Rusich shot a pistol into the air; Freitas threw the firebomb at the house, which caught on fire. Freitas immediately drove back to the cottage where Guzman awaited them and Rusich disposed of expended casings.

Guzman's defense theory was that Rusich and Freitas firebombed the house for their own unknown motives. Guzman was not present and did not mastermind the plot. Following up on street rumors fueled by widespread knowledge of the bad blood between him and David Pequeno, the police focused on him and ignored evidence that pointed elsewhere.

Freitas testified in his own behalf. He said he gave Guzman and Rusich a ride that night, thinking he was driving them to a drug assignation. Instead, he saw Guzman throw something at a window and a house went up in flames. Then Rusich started shooting at the house. The two ran back to the car and Freitas drove off fast. He knew nothing about the firebombing before it occurred and was "duped" by Guzman and Rusich into driving them to and from the crime scene.

In this appeal, defendant Guzman argues that (1) the evidence is insufficient to sustain the arson-murder special circumstance finding; (2) the trial court erred in admitting the preliminary hearing testimony of an absent witness; (3) the trial court erroneously admitted irrelevant and highly inflammatory evidence; (4) the prosecutor committed *Griffin* error in closing argument; (5) the trial court erroneously refused to fully instruct on accomplices; and (6) defense counsel was ineffective for failing to object to the prosecutor's argument attacking defense counsel's integrity.

Defendant Freitas argues that the trial court committed a number of instructional errors that compromised his defense theory that he did not aid and abet the arson until after the fatal act of throwing the firebomb was completed and thus was not liable for the murders. He argues the trial court should have instructed the jury (1) that there is no such thing as retroactive conspiracy liability; (2) on the elements of conspiracy; and (3) on the correct version of CALJIC 8.27. He also argues that the court should not have instructed on arson-destructive device felony murder. In addition, he contends that defense counsel was ineffective for failing to object to the prosecution's plea and immunity agreement with Rusich, and that two of the three multiple murder special circumstances must be stricken. Finally, each defendant joins in the other's arguments.

FACTS

Background

Nicole Fierro dated defendant Guzman for about two years, but broke up with him in December 1997 or 1998. Guzman was very upset about the break-up; he threatened to commit suicide and told her if he could not have her, nobody else could. About six to eight months later, she started dating David Pequeno. This made Guzman even angrier. He sometimes turned up unexpectedly when Fierro and Pequeno were together. A year after she broke up with Guzman, he came around the Pequenos' house looking to fight

David Pequeno. Her romantic involvement with Pequeno lasted six to eight months, and ended about six months before the fire.

Although she denied it at trial, she told police that she had personally heard Guzman tell David Pequeno that he would shoot at his grandparents' house and kill him and his family. Fierro also told the police Guzman said he hated Pequeno and wanted him dead. After the firebombing, Fierro told the police Guzman was probably responsible; and that everyone thought so.

David Pequeno met Guzman in 1996 when he joined the Firme Mafia (F.M.), a Gilroy street gang of which Guzman was also a member. Both Guzman and Pequeno were involved in drug dealing. According to Pequeno, he started dating Fierro two years after she broke up with Guzman. About six months before the fire, Guzman visited David Pequeno at his grandparents' house in connection with a drug transaction. They argued about Fierro. Guzman called Fierro "his property." After that, Guzman often came by Pequeno's grandparents' house to harass and threaten him. He called Pequeno on the telephone and told Pequeno he was going to kill him, and if he couldn't kill him, he would kill Pequeno's family.

Once, when Guzman came to Pequeno's house to berate him about seeing Fierro, he hit Pequeno on the back of the head with his fist after Pequeno turned to go. Another time, Guzman threatened Pequeno with a knife at a liquor store. When Pequeno left, Guzman followed him and rear-ended a car in which Pequeno was a passenger. Another time, he knocked on Pequeno's door late at night; Pequeno got his gun. They argued; Pequeno's father and cousin stopped Pequeno from shooting Guzman. Guzman was not armed, but he threatened to kill Pequeno's father if he couldn't kill Pequeno. Guzman continued to drive by Pequeno's grandparents' house and yell. Family members put pressure on Pequeno to move out of his grandparents' house. Eventually, in March of 2000, he partially moved out, although he continued to spend half his time there. There were no confrontations in the month before the fire.

On the night of the fire, Pequeno was visiting at a friend's house two blocks away from his grandparents' house. When the friend informed him he had seen an ambulance going to his grandparents' house, Pequeno went there straight away. The house was on fire. He later told police he suspected Guzman had started the fire. He reported to them that Guzman was rumored to be involved and was bragging about the fire to mutual friends, but he refused to name the sources of his information.

Eye Witnesses

Miguel Garcia could see the Pequeno house from the rear window of his apartment. That night he heard three gunshots and looked out his window. He saw a little fire and a white car parked in front of the burning house. The fire "came out quickly." He heard another shot and then the car left. He did not, however, see how many people were inside the car. Later, he was shown a gold Nissan by police but did not identify it as the car he saw.

Jose Luis Mendoza also lived across the street from the Pequeno house. As he came home from work sometime after 2:00 a.m., he saw a tan or gold car slowly drive up to the Pequeno house and stop. There were three people in the car. As he was going to bed he heard two loud noises like shots. He looked out his window and saw people running. He saw two people throw something at the house. They were two skinny men[2] of "medium" age; at the preliminary hearing he described them as being 20 or 25. They got into the car and left. The house caught on fire right away.

The Police Investigation

Fire marshal Ramona Keegan found a magnum malt liquor bottle fragment in the living room and a wick in a bottleneck on a doormat under a north window, outside the

[2] Rusich testified that people eat less when they are using methamphetamine, and there was little or no food in the Roop Road house. He said he and Freitas had gained quite a bit of weight since their incarceration.

house. She surmised that a bottle filled with a flammable liquid hit the house and all but the neck entered it. The gas vapors from the liquid ignited the wooden structure.

Expert testimony established that the torn edge of the cloth wick found at the Pequeno house matched the torn edge of the sheet found in the garbage at the Roop Road property. Guzman's fingerprints were found in the Nissan.

The Accomplice

James Rusich testified for the prosecution under a grant of "use and derivative immunity," meaning that nothing he said could be used against him even if he continued to be prosecuted for murder. In exchange for his truthful testimony, murder charges would be dismissed and instead Rusich would be permitted to plead guilty to the lesser crime of accessory after the fact and serve a three-year prison term which, with credit for time served, meant he would be free. Rusich acknowledged that he was not testifying because of a guilty conscience but because he did not want to go to prison.[3] When he was arrested on July 12, 2000, and first spoke with the police, he lied and denied any involvement in the firebombing.

Rusich was a heavy methamphetamine user, and Guzman supplied him with his drugs. Rusich supported his habit by selling part of the drugs he purchased from Guzman, and by stealing property from unlocked cars. In June of 2000, Rusich moved to the main house on a property located on Roop Road with Donna Moyles and her two sons. The property also included a back cottage, which Moyles rented to Guzman, who supplied her with methamphetamine. Several of the people who testified at the trial – Greg Zamarron, Liz Binongial, Mike Freitas, his girlfriend Laura Cadei – would stay at the Roop Road house off and on. Freitas injected methamphetamine, which he bought from Guzman. He only knew Freitas for about three weeks. He knew of David Pequeno

[3] Rusich had a felony conviction for second-degree burglary, but apparently had never been to prison.

through an ex-girlfriend, and knew where Pequeno's grandparents lived. He did not have anything against the Pequeno family and, as far as he knew, neither did Freitas. Freitas would bring stolen cars to the house; sometimes Rusich would go with Freitas on "missions" in search of cars and motorcycles to steal.

Rusich recalled that when he first moved into Roop Road, Guzman asked if anybody knew David Pequeno's whereabouts. He offered money for information about Pequeno.

A few days before the fire, Freitas brought a gold Nissan back to the house, saying he had borrowed it and never given it back. On the night preceding the 2:00 a.m. fire, there were several people at the house, including himself and possibly Freitas. Sometime before midnight, Guzman told Rusich that if he were to do anything to David Pequeno, there would be a motive. Later, he, Guzman and Freitas went for a ride in the Nissan, with Freitas driving and Rusich in the back seat. Guzman directed Freitas to drive by David Pequeno's house. Both Rusich and Guzman pointed the house out to Freitas. From there, they drove to a gas station market, where they purchased a "40-ouncer" of beer. They went back to Guzman's cottage on Roop Road, where Guzman began to talk about what was going to happen. He told Rusich and Freitas how to make a firebomb with flammable gas and a wick. Just as Guzman was pouring the beer out of the bottle, Jeff Garner walked by looking for "weed." With Garner still there, Rusich and Freitas went inside the main house to their room to make the wick. They took a sheet off the bed; Freitas cut it with a pruner's knife.

Guzman told Rusich to "earn [his] keep" and shoot at the house. Rusich retrieved Guzman's .38 pistol. Guzman told Freitas to "throw it." Guzman stayed in his room with Greg Zamarron, Sean Subia and a woman named Michelle (Lujan) so that he would have an "alibi."

Rusich and Freitas left Roop Road in Freitas's gold Nissan. Freitas drove to a gas station and filled up the bottle with gasoline. Rusich carried the bottle by his feet. They

drove to a school yard up the street from the Pequeno house; Freitas put the wick in the bottle. They waited for a man to go into an apartment house, then drove around the block and parked in front of the Pequeno house with the lights off. Freitas told Rusich not to shoot him when was coming back, then he alighted from the driver's side of the car, lit the wick and threw the bomb at the house. As Freitas ran back to the car, Rusich fired off several shots with the gun, aiming high so that he would not hit Freitas. He fired all six shots of the revolver and Freitas drove away fast, back to Guzman's cottage.

When they got back, Guzman was there with "Liz, Michelle, Greg and Sean." Rusich handed Guzman the gun and said, "It's done." Guzman handed Rusich back the empty casings. Rusich took them and left. Freitas stayed at the cottage with Guzman. Rusich threw the casings into an orchard behind the cottage and went back to the main house to go to bed. Donna Moyles was there. When Rusich went to bed, Freitas' girlfriend, Laura Cadei, was already asleep; he did not wake her.

Rusich woke up sometime the next afternoon. Guzman showed him a newspaper article in which it was reported that three people had died in the fire. Rusich asked if David Pequeno was one of the them, and Guzman said, "no." Rusich avoided talking about the fire with Guzman or Freitas.

Although Rusich admitted his own involvement to only one person, a few weeks after the fire he learned that a homicide detective was looking for him, and "[e]verybody in town" speculated that Guzman had something to do with it.

Freitas was arrested at the house for car theft a few days after the fire. Although Rusich was there, he was not arrested. After that, Guzman told Rusich he should flee.

Rusich and Guzman were arrested together in a car containing methamphetamine at a gas station on July 12, 2000, after being followed by police for several weeks.

After their arrests, Rusich and Freitas shared a cell. Rusich asked Freitas what he was going to say. Freitas told him that Laura Cadei was his alibi and that she would say they were sleeping.

Others Who Testified Under a Grant of Immunity

In addition to Rusich, seven other witnesses also testified under grants of immunity: Donna Moyles, Jeffrey Garner, Alfred Jessie Rios, Laura Cadei, Mario Vigil, Rosendo Amezquita and Ludivina Chavez.

At the time of trial, Donna Moyles was on probation for possession of marijuana for sale. She also had misdemeanor convictions for child endangerment and contributing to the delinquency of a minor. She was a methamphetamine addict in June of 2000 when she moved into the house on Roop Road. Guzman was her main supplier. She lived in the main house on Roop Road; Guzman paid her $1,100 a month in rent to live in the back cottage. Rusich also stayed at Roop Road and managed the drug traffic for Guzman. Freitas and his girlfriend, Laura Cadei, came to stay at Roop Road for about three weeks in June.

On the night of the fire, Guzman borrowed her SUV at around 2:00 a.m. on the night of the fire and returned it at 5:00 a.m. The next morning, he drove her to the airport in a gold Nissan. She also testified that some time in June 2000 she found a spiral notebook in her entry way closet with a poem in it that said something like "You are going to burn if you're touching my girl. I'm the boss." At trial, she denied telling a DA investigator that Guzman wrote the poem. The investigator testified that she contacted him about the poem and seemed confident that Guzman had written it.

Jeffrey Garner was a drug user who frequented the house on Roop Road. He had convictions for vandalism, assault and battery. He confirmed that Guzman sold drugs there to people who came to the house to buy and use methamphetamine. On the night before the firebombing, Garner went to the Roop Road house to buy drugs. Rusich, Guzman and Freitas were there. Guzman said they had to leave and all three got into a gold Nissan. Guzman said, "We'll do it." Freitas drove; Guzman was in the front passenger seat and Rusich was in the back. Garner left after they did, around 10:00 to 11:00 p.m.

Garner also testified to a number of admissions made by Guzman after the fire. Garner went back to Roop Road to buy more drugs the next afternoon. Guzman and Freitas were in the main house, along with other people. Garner testified that all he remembered was Guzman "saying something about burning in hell . . . he said that he was gonna go to hell . . . or that . . . he didn't care . . . . I think he said something about somebody being old . . . . He was laughing about some shit." After reviewing his preliminary hearing testimony, he recalled that Guzman said "I did them a favor. They were old already." He also recalled Guzman saying something like "I did it. Oh, shit. Oh, God. I did it. I did them a favor." Garner testified that he spoke truthfully when he was interviewed on July 6, 2000, by Detective Callahan, although he was nervous, afraid of being killed by Guzman, hung over and "spun" at the time.[4]

Jesse Rios was a member of the F.M. gang but claimed not to know if Guzman or Pequeno were also members. He said Guzman told him he was not a member. Rios was aware that Guzman did not like David Pequeno, but he did not know why. At trial, Rios did not remember Guzman asking him to firebomb the Pequeno home, nor did he remember telling a DA investigator that Guzman asked him to firebomb the Pequeno home, but that Rios had refused. The DA investigator testified that he interviewed Rios. Rios said that Guzman had asked him to firebomb a house. Rios had a prior conviction for assault with a deadly weapon and was on probation for that offense at the time of trial. He had talked to the DA investigator in the hopes of obtaining a lenient sentence on that charge.

Laura Cadei had a felony conviction for vehicle theft. She didn't do drugs. She was Freitas's girlfriend and she stayed with him at the Roop Road house for about a week

[4] He described "spun" as "being up for a couple of days . . . just seeing stuff." Garner also testified he was "strung out" on drugs and lack of sleep on the night of the fire and could not remember things clearly.

before he was arrested. Freitas, Rusich and Cadei shared a room. Freitas was an intravenous methamphetamine user; he stole cars and property out of cars.

On the night before the fire, Freitas left about 8:30 p.m. to get her some food from McDonald's; he was gone about half an hour and returned with the food. She and Freitas went to bed around midnight. When she woke up around 10:00 a.m. the next morning, he was with her. Cadei acknowledged that she told the DA investigator that she had sex with Freitas and then fell asleep at 10:30; she did not think he spent the whole night with her. However, at trial she said she had lied to the investigator.

Before the fire, when they were in the gold Nissan, Freitas told her he owed Guzman a favor because he sold Guzman a stolen truck that was later confiscated by the police. Then he said he was leaving.

Mario Vigil had two felony grand theft convictions and, at the time of trial, was in a drug treatment program for being under the influence of methamphetamine. He was a childhood friend of Freitas's and knew Guzman through Freitas. Vigil was arrested while driving the gold Nissan. Freitas loaned it to him because his motorcycle had broken down. Vigil asked Freitas if the car was stolen; Freitas said no. Vigil was very angry to have gotten arrested in a stolen car and told the police he got the car from Freitas.

Vigil testified that a few days before the fire, Freitas asked him about how to make a firebomb. Sometime before the fire, he also heard Guzman say that he was going to make someone "grieve for the rest of his life" for what that person had done. Guzman also said that if that person's parents were dead it would be "more effective" for that person to be alive and grieving.

Rosendo Amezquita was granted immunity and testified at the preliminary hearing through a Spanish interpreter. His preliminary hearing testimony was admitted at trial after he was found unavailable to testify.

In 1992 he had been convicted of drug sales and, at the time of the preliminary hearing, had been recently convicted of possession of methamphetamine for sale although

he had not yet been sentenced. In addition, he was facing pending charges for possession and possession for sale of drugs.

In June of 2000, he was buying drugs from and selling drugs to Guzman and Lu Chavez. He said his memory of that time was "more altered" than at the time of his testimony, because at that time he was "more involved in drugs."

On June 23, 2000, he picked up Chavez and Guzman in his van. Guzman told him what route to take back to Gilroy. As he was driving, he realized there were a lot of police officers and yellow police barrier tape on the street. At that point in time, he was not yet aware that there had been a house fire on Second Street in Gilroy. As he drove, he could hear that Guzman and Lu were talking in English, but he wasn't really paying attention.

After he parked the van, a person named Javier joined them and sat in the back seat with Guzman, conducting a drug transaction. Lu was in the front seat. Lu asked Javier if he had seen the police cars and Javier said he had not. Referring to the house fire, Lu asked Javier, "Who do you think did that?" Then she mentioned Guzman's name and said, "He did it." Guzman responded by asking, "After this, do you think people will respect me?"

At some point, Amezquita asked Guzman if he had done it. Guzman responded by winking his eye, nodding his head and making a gesture like shooting a gun, which Amezquita interpreted "like affirmative."

Except for these comments, Amezquita never heard Guzman talk about the fire or say he had firebombed a house. He never heard Guzman talk about David Pequeno. Once, about a year before the fire, Guzman told him that he hated a guy because he had "committed treason" with Guzman's girlfriend, but he never named either the guy or the girlfriend.

Later, when Amezquita was out on bail, he got a phone call from Guzman, who thought Amezquita had made a video for police. Guzman told Amezquita he had to "fix"

what he had told the police. Another person who was present explained that Guzman wanted him "to say that that night he and I had been with two . . . women." Later on, when Amezquita was in custody, he was on a jail bus with Guzman, Rusich and Freitas. Guzman sent him to speak with Rusich and Freitas. Rusich made a gesture drawing his hand across his throat, which Amezquita understood to mean that "they meant to kill me or manipulate me." Freitas told him that he had spoken to the police too much and that he should change his statement. After that, Amezquita saw them one more time on the bus. Guzman called out his name and told him he was going to get even.

Lu Chavez testified at trial that Amezquita no longer lived in the area. In June of 2000 she was buying drugs from him and was consuming over an ounce of methamphetamine a day, although by the time of trial she had been "clean" for two years.

On June 23, 2000, she had not had any sleep for at least seven days. She read in the paper that the Pequeno family home had burned down and that three people had died earlier that morning. Later in the morning she went with Amezquita to pick up Guzman and look for drugs to buy. She was very high on drugs. Guzman directed Amezquita to go to a particular part of Gilroy, where they picked up Javier. The streets near the burned house were blocked off. As they drove past the scene, Guzman pointed to the fire and said, "See that? See that?" and "This is for people to respect me." At trial, Chavez claimed not to know that three people had died in the fire when Guzman made those statements. She did not recall Amezquita asking Guzman if he was responsible for the fire or hearing Guzman take responsibility for the fire. She denied telling the D.A. investigator that he did take responsibility, although she recalled telling him that Guzman said, "Fucking asshole thought he wasn't going to pay me." The investigator testified that Chavez did tell him that Guzman took responsibility for the fire or firebombing, but he admitted that Chavez did not say that he used those words.

Elizabeth Binongial did not have immunity. She was Guzman's girlfriend in June of 2000 and the mother of his son, born in 2001. She never saw him sell drugs, but they

both used drugs at the time. They never discussed David Pequeno. The night before the fire, she was with Guzman at his cottage on Roop Road. She recalled that Michelle Lujan, Greg Zamarron and Sean Subia were also there, and that other people came in and out. Around 10:00 p.m. Guzman left to get her some fast food. He was gone for less than half an hour, but he returned empty-handed. Later, about 3 or 4 a.m., Guzman and Binongial took Lujan home. On their way to her house, they drove by the fire, and saw police and lights. When they got back, everyone else was gone, and they went to bed.

At Guzman's request, she contacted Detective Callahan the day after Guzman was arrested. She told Callahan that Guzman was with her the night of the fire, and that they went to bed around 11:00 p.m. and made love until 1:30 a.m., but the detective did not believe her.

A few days later, she confronted Guzman about the fire, because people had told her that Guzman had been admitting he "did the fire." Guzman "swore up and down" he did not do it; Guzman said he was telling other people differently to see who his friends were.

Greg Zamarron did not have immunity. At the time of trial, he was in custody and facing two pending misdemeanor charges for vandalism and petty theft. He confirmed that he was at Guzman's cottage on the night before the fire from 8:30 to 11:00 p.m. Sometime during the week after the fire, Zamarron asked Guzman if he was responsible for the fire. Guzman replied, "Why do you want to talk about that?"

Jailhouse Informants

Donald Truesdale, who had suffered three felony burglary convictions, one domestic violence conviction and numerous theft-related misdemeanor convictions, was housed in the cell next to Guzman. Guzman asked Truesdale if he had heard about a triple murder case. Guzman showed him a diagram of floor plan with three bodies drawn on it. Truesdale asked Guzman if he had committed the murders. Guzman said he had, but he expected to "walk." Truesdale acknowledged on cross-examination that he wrote

Detective Callahan a letter stating that he did not want to go back to prison. He also acknowledged that that he had given information to the police in other cases.

Kevin Hall was in custody on a warrant at the time of trial. He had multiple convictions for theft and drug possession. He met Freitas when they were both in jail; they spent eight or nine hours together in a holding cell and were later housed in the same unit. Freitas told Hall that he was being interviewed about a firebombing in which three people were killed. Hall started calling police officers he knew to see if there really had been such a firebombing and eventually spoke with one Officer Trejo several times. Hall hoped to be able to help himself by talking to the police. According to Hall, eventually Freitas admitted to him that he was involved in a firebombing. He said he had made the bomb out of a 40-ounce beer bottle and some oil and gasoline. "[H]e said that he didn't know what a smaller bottle would do, but he knew that a 40 ounce bottle would pretty much burn it up, burn the place down." He said the bottle "was thrown into the residence," and that "as the place was burning, he . . . shot into the building." He said a Maxima was driven to the scene, and that the car he was arrested for stealing was the same one used in the murders. He also said he had told his girlfriend to tell police they were in bed together on the night of the murders. Hall was later placed in a witness protection program and paid about $38,000.

It was established through jail records that Truesdale had been housed near Guzman and Hall had been housed near Frietas.

Evidence of Guzman's Gun Ownership

Rusich testified that Guzman owned a couple of mini-14 rifles and .25, .38 and .357 caliber pistols. Guzman would sometimes bring his guns when he made drug deliveries and shoot at road signs. After the fire, he broke up a party at Roop Road by shooting a .38 caliber gun into the ground, according to Rusich. Jeffrey Garner also testified that Guzman kept those guns in his home.

Freitas's Testimony

Freitas was 20 years old at the time of trial. He admitted being a methamphetamine addict from the age of 15. As a juvenile he was charged with possession of drugs and auto theft and spent time confined in a juvenile facility. He was released from custody on May 8, 2000. He reunited with Cadei, staying in motel rooms with her, and resumed using methamphetamine. He met Guzman in mid-June 2000 through his cousin, who was also an addict. He bought drugs from Guzman at the Roop Road house. On one visit to Roop Road, Donna Moyles overheard Cadei say she was looking for a hotel to stay in; Moyles offered to let Cadei and Freitas stay in a recently vacated room in her house. They shared the room with Rusich.

The night before the fire, Freitas drove a gold Nissan he had stolen that morning to McDonald's to get Cadei some food. Freitas stayed with Cadei until 12:00 or 1:00 a.m. when Guzman came into their room and asked him for a ride to "town," i.e., Gilroy. Freitas agreed. Cadei was asleep. Guzman was carrying the bag he customarily used for transporting drugs, and a backpack where he kept his gun and scale. Freitas drove; Guzman sat in the front passenger seat and Rusich sat in the back. Freitas did not know where he was going, so Rusich or Guzman gave him directions. When they arrived at their destination, Freitas parked and turned off the motor and the lights. Guzman got out of the car, saying he would be right back. Freitas was on the look-out for "cops," because he "believed there was going to be a drug action." He did not notice the smell of gasoline while driving into Gilroy.

He couldn't see exactly where Guzman went, except that he disappeared down the street. The very next thing that happened is that Guzman re-appeared and motioned with his hands for Freitas to "come on." Freitas started up the car, turned on the lights and pulled up to where Guzman was located. Then Freitas could see that Guzman had something in his hands that was on fire. Right after that "he threw something through a window, and the house [was] engulfed in flames." Freitas "could not believe what just

happened." Freitas "just wanted to get the hell out of there." Rusich started firing at the house, "scar[ing] the hell out of " him. He could not tell if Rusich was firing from inside or outside the car. Guzman "was running back to the car." Guzman got into the front passenger seat and then Freitas "floored it," burning rubber and going through stop signs. After almost losing control of the car, he slowed down and headed back to Roop Road. On the drive back, Freitas asked Guzman and Rusich "what the fuck just went down." Guzman said, "Don't worry about it. Just don't worry about it." Rusich said, "I don't want to talk about it. Just don't talk about it." There was no other conversation on the way back to Roop Road.

Back at Roop Road, Rusich and Guzman went to the cottage and Freitas went to the room in the main house he shared with Cadei. She was still asleep.

Freitas learned that three people had died in the fire the next morning when Guzman told him. Later that day, Guzman had a newspaper that he was showing "to everyone in the living room." He was "flaunting around with it . . . saying, "I did this. I did this." He also said "[s]omething about a girl. That's why these old people died."

A few days after the firebombing, Vigil came to Roop Road to buy drugs. While Vigil and about five other people were there, Guzman said, "David's going to suffer for the rest of his life. He's going to be without his grandparents. That's better than him dying." Sometime after that, Vigil came back to Roop Road on his motorcycle to borrow Freitas's car. Vigil left in the gold Nissan, Freitas took a nap, and the next thing he knew he was being arrested at gunpoint. The police told him they had gotten word that he had stolen a car.

Freitas maintained he did not know the Pequenos' house was going to be firebombed. He denied driving by the house earlier in the day, or going to any gas stations, or seeing Rusich cut up the sheet for a wick, or asking Mario Vigil how to make a firebomb. He recalled an incident when he, Rusich, Guzman and Amezquita were being transported on a bus, but he denied that anyone threatened Amezquita.

After his arrest, Freitas was housed in the same pod as Kevin Hall, in the bed next to his. He acknowledged telling Hall he was "involved" in a firebombing and "it was over a girl," but he did not tell Hall that he made or threw the firebomb, or that he fired a gun at the Pequeno house.

Freitas acknowledged that he sold Guzman a stolen truck in exchange for drugs, and that the truck was later confiscated by the police. However, Guzman was not angry and did not demand that he do any favors to make up for the loss.

During a tape-recorded telephone call from the jail, Freitas's mother said, "The guy probably asked you to take him somewhere, and you didn't even know where you were going." Freitas replied, "No, Mom, it wasn't like that." He knew he was being tape-recorded and he did not want anybody to know what had happened. He denied being responsible for the murders.

DISCUSSION

As noted in the introduction, each defendant joins in the other's contentions. With that understanding in mind, and for ease of reference, we will first discuss the six claims raised directly by defendant Guzman, and then the six claims raised directly by defendant Freitas.

I. Guzman's Contentions

Defendant Guzman assigns six errors that, he asserts, were sufficiently prejudicial to warrant reversal of his convictions, either singly or cumulatively. First, he argues that Rosendo Amezquita's preliminary hearing testimony should not have been admitted as evidence because the prosecution failed to exercise due diligence in securing his presence at trial. Next he argues that the trial court should not have admitted evidence of (1) a poem assertedly written by him, because a proper foundation authenticating defendant as the author was not laid; and (2) Nicole Fierro's testimony that defendant liked weapons

and possessed many of them. Third, defendant argues the trial court should have instructed the jury with CALJIC 3.13, that one accomplice may not corroborate another. Fourth and fifth, he argues the prosecutor committed misconduct in closing argument by alluding to defendant's failure to testify, and defense counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's disparaging remarks about defense counsel's integrity. Finally, defendant argues the evidence was insufficient to support the arson-murder special circumstances. As we explain, we find no reversible error.

A. Admissibility of Amezquita's Preliminary Hearing Testimony

Defendant Guzman asserts the trial court erred by ruling that Rosendo Amezquita was unavailable to testify and that his preliminary hearing testimony was therefore admissible at trial. This error, he argues, violated his constitutional right to confrontation. Relying primarily on *People v. Sandoval* (2001) 87 Cal.App.4th 1425, defendant contends that Amezquita should not have been found unavailable because the prosecutor failed to exercise due diligence in securing Amezquita's attendance at trial. Specifically, he argues that the prosecutor's efforts were too little too late in that (1) those efforts consisted solely of "some phone calls on the day of the hearing into due diligence which was midtrial" and (2) the prosecutor "refused to explore other avenues of presenting Amezquita's live testimony, such as videoconferencing" out of "prosecutorial pique." We first set forth the factual background for Guzman's contention. We then discuss the applicable legal principles. Finally, we apply those principles to this case and explain why we find no error.

Factual Background

On June 20, 2002, the second day of trial testimony, a hearing was held on the admissibility of Amezquita's preliminary hearing testimony. John Kracht, the district attorney's investigator, testified that in June or "thereabouts" he had talked to

Amezquita's parole agent who informed him that Amezquita had been deported to Mexico on March 6, 2002, after serving his prison sentence. Kracht then contacted Amezquita's brother, who put him in contact with Amezquita's wife, who in turn gave Kracht Amezquita's phone number and address in Mexico. He then spoke to Amezquita, who said he would be willing to come back and testify. On June 11, he wrote a letter to Bruce Ward at the Immigration and Naturalization Service (I.N.S.) requesting that Amezquita be allowed to return to the U.S. to testify. The deputy director called Kracht about the letter. In a subsequent conversation the deputy director requested more information and "a rather firm assurance" that Amezquita would return to Mexico after testifying. He said he had looked up Amezquita's record and concluded Amezquita was a "methamphetamine smuggler" who would "probably bolt" as soon as he reached the United States. Kracht could not give the deputy director the assurances he wanted. To ensure Amezquita's coming and going, he felt he would have to have Amezquita in custody, but Amezquita was not wanted for anything and could not simply be locked up.

Kracht was aware that Amezquita was not a U.S. citizen at the time he first interviewed him for this case, but he was not aware of any I.N.S. hold while Amezquita was in custody and did not attempt to subpoena him for trial while he was in custody.

At the district attorney's request, Kracht had looked into the possibility of video conferencing. He had learned that Santa Clara County had the capability, and that there was a potentially compatible site in the State of Jalisco. Amezquita would have to be transported there from his home in the neighboring state of Aguascalientes. He estimated that it would take probably a week and a half to two weeks to set up. He had not yet contacted Amezquita about his willingness to travel to Jalisco; he had called Amezquita that day, but he was not at home.

During argument on the motion to exclude Amezquita's prior testimony, Guzman's attorney admitted that even if the prosecution had served a subpoena on Amezquita, the I.N.S. would have deported him. Asked by the court whether it was his

position that he "would not be satisfied with" or "not agreeable to" a videoconferencing procedure because the district attorney should have looked into it earlier, defense counsel was unclear. He seemed to suggest that the offer of videoconferencing did not make up for the prosecutor's lack of diligence in securing Amezquita's appearance at trial. The prosecutor, for his part, saw only the disadvantages of videoconferencing – a scratchy phone connection, with a Spanish interpreter, and a protracted session with court breaks – but he left it "up to the Court."

The trial court ruled: "I find that [Amezquita] is [] unavailable by virtue of the fact that he is in another country and there is no way to compel him to return. Plus, as the testimony indicates, the I.N.S. is reluctant to allow him back in the country without an absolute guarantee that he be returned to Mexico, which guarantee really realistically cannot be given by the People because he's not in custody. They can pick him up at the airport. That doesn't prevent him from walking out of this building and disappearing."

Applicable Legal Principles

"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal.Const., art. I, § 15.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made a 'good-faith effort' to obtain the presence of the witness at trial. (*Barber v. Page* (1968) 390 U.S. 719, 725; accord *Ohio v. Roberts* (1980) 448 U.S. 56, 74 [overruled on another point in *Crawford v. Washington* (2004) 541 U.S. 36].) California allows introduction of the witness's prior recorded testimony if the prosecution has used 'reasonable diligence' (often referred to as due diligence) in its unsuccessful efforts to locate the missing witness. (Evid. Code, § 240, subd. (a)(5) . . . .)" (*People v. Cromer* (2001) 24 Cal.4th 889, 892.)

Under *Cromer*, we use a two-pronged approach to answer the question of whether admission of a witness's prior testimony at trial violated the defendant's confrontation rights. "[T]he first inquiry is a matter of determining the historical facts-a detailed account of the prosecution's failed efforts to locate the absent witness. Those facts will rarely be in dispute. When they are, a reviewing court must, of course, apply a deferential standard of review to the trial court's factual findings." (*People v. Cromer* (2001) 24 Cal.4th at p. 900.) "[T]he second inquiry—whether these historical facts amount to due diligence by the prosecution—requires [¶]…[¶] that appellate courts [] independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*Id*. at pp. 900-901, fn. omitted.) " '[D]ue diligence' is 'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citations.] Relevant considerations include 'whether the search was timely begun' [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation]." (*Id*. at p. 904.)

Discussion

Any discussion of due diligence in the context of this case must start with an understanding that Rosendo Amezquita became unavailable to testify at trial within the meaning of Evidence Code sections 240 and 1291[5] on March 6, 2002, when he was

[5] Evidence Code section 240 provides in relevant part: " (a) . . . 'unavailable as a witness' means that the declarant is any of the following: [¶] . . . [¶] (4) Absent from the hearing and the court is unable to compel his or her attendance by its process. (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."

Evidence Code section 1291 provides in relevant part: "(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered

deported to Mexico. As of that date, he was out of the country and could not be compelled by the court's process to return and testify. The Treaty for Mutual Legal Assistance, referenced in *People v. Sandoval, supra*, 87 Cal.App.4th at p.1439, did not change this fact, and defendants do not appear to dispute it. Defendants do maintain, however, that despite the fact that Amezquita could not be compelled to appear at trial, the prosecution's efforts to secure his voluntary attendance fell short of the constitutionally required minimum effort because the efforts were not timely begun, available leads were not competently explored, and "other avenues of presenting Amezquita's live testimony," such as videoconferencing, also went unexplored.

As to the factual matters that defendant cites in support of his arguments, we read the record differently. The prosecutor's efforts were not, in our view, untimely begun. As of March 6, 2002, when Amezquita was deported, discovery was still underway. A trial date of February 4, 2002, had been vacated and reset to May 13, 2002. Trial was later continued to June. Even if the prosecutor had served a subpoena on Amezquita before he was deported, as defense counsel was forced to admit, the subpoena could not have kept him in custody or prevented his deportation. Kracht's efforts to locate Amezquita began in June or "thereabouts" – apparently several weeks before the hearing – and consisted of more than "some phone calls on the day of the hearing." Kracht did say he made a phone call to Amezquita on the day of the hearing to see if he would be willing to travel to Jalisco from his home in Aguascalientes to participate in a videoconference. However, this phone call had been preceded by substantial detective work that had led to the discovery of Amezquita's whereabouts and phone number in Mexico in the first place. It had also been preceded by at least one previous phone call in which Amezquita had been persuaded to attend trial and testify voluntarily. Following

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was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

that phone call or calls to Amezquita, Kracht had written a letter to the director of the I.N.S. and had several phone calls with him on the subject of securing a visa for Amezquita. Defendant characterizes the stalemate between the I.N.S. and the prosecutor's office over the I.N.S.'s refusal to issue a visa without an assurance that Amezquita would be returned to Mexico as an "I.N.S. snag." However, we view it as an insurmountable barrier to securing Amezquita's attendance at trial. We agree with the trial court that Amezquita could not lawfully be taken into custody; without custody, the prosecutor could not guarantee his return to Mexico; without that assurance, the I.N.S. would not issue Amezquita a visa, and without a visa, he could not legally enter the U.S. At this point, the prosecutor had exhausted his available means of securing a foreign witness's attendance at trial and discharged his burden of due diligence.

Defendant argues, however, that the prosecutor should have pursued the option of videoconferencing. Preliminarily, we note that at the due diligence hearing, when sounded out about the option, defense counsel did not unequivocally request a videoconference or even agree that videoconferencing would satisfy the due diligence requirement or the confrontation clause. Therefore, we think the argument is waived.

We also, however, reject defendant's argument on its merits. *People v. Sandoval,* on which defendant relies, does not hold that failure to pursue videoconferencing demonstrates a lack of due diligence, or that videoconferencing satisfies the Sixth Amendment's confrontation clause. On the contrary, the *Sandoval* court stated: "We need not, and do not, hold that live teleconferenced testimony from a remote location is necessary to meet the demands of the confrontation clause in cases in which the witness refuses to attend trial and cannot be compelled. We also need not and do not hold that such remote testimony would be constitutionally acceptable in the place of face-to-face confrontation. It is sufficient for our present purposes to point out, however, that the prosecution had several reasonable alternatives it could have pursued to obtain [the witness's] live testimony at trial. Instead of making a good faith effort to obtain any

category of contemporary, live testimony, the prosecution threw up its hands and asserted [the witness] was unavailable simply because he was a foreign citizen residing outside of the United States. The confrontation clause, which allows for some exceptions to the face-to-face confrontation requirement, calls for more." (*People v. Sandoval, supra*, 87 Cal.App.4th at p. 1443.)

We decline to hold that videoconferencing was required in this case. We further find that the prosecutor in this case did not simply "throw up his hands" when he discovered that Amezquita was "a foreign citizen residing outside of the United States." (*People v. Sandoval, supra*, 87 Cal.App.4th at p. 1443.) In our view, the record demonstrates that the prosecutor made substantial efforts to secure Amezquita's voluntary attendance at trial. We hold the Sixth Amendment's requirement of due diligence was met in this case.

B. Admission of Poem and Gun Evidence

The Poem

Donna Moyles, defendant's landlady, was asked, "Did you recall any writings by Mr. Guzman talking about revenge or burning?" Moyles replied, "I remember finding a note." She went on to testify that prior to the fire, she found a notebook containing a poem in her hall closet among Jesse Rios's belongings. She could not remember the poem word for word but she did recall the following line: "You are going to burn if you touch my girl. I'm the boss." When she testified she did not know if the notebook contained Guzman's writings, defense counsel objected to the lack of foundation and authentication, and the court struck "the earlier answer given by this witness identifying the writing as being Mr. Guzman's."

At that point, the prosecutor attempted to lay the proper foundation by impeaching her trial testimony with prior inconsistent statements she had made to DA investigator

John Kracht. Moyles, however, denied telling Kracht it was Guzman's poem or that Guzman had written it.[6]

On cross-examination, Moyles testified she did not see Guzman write the poem, she was not familiar with Guzman's handwriting, she did not recognize the hand in which the poem was written, and that the notebook also contained "female doodling."

Defense counsel then moved to strike Moyles's entire testimony as to the poem on the grounds that "it's all speculation, it's hearsay, and it's irrelevant." When the prosecutor responded, "She told my investigator that it was [Guzman's] poem," defense counsel requested that the court hold an Evidence Code section 402 hearing outside the jury's presence to determine if a proper foundation could be laid through Kracht's testimony.

At the hearing, Kracht testified that he asked Moyles if defendant had ever claimed responsibility for the killings to her, and Moyles responded that he had not, but that "he had written a poem of about 20 to 25 lines in a school sort of notebook. She read it and recalled a couple of phrases that she repeated" to Kracht. She did not give Kracht any details about how she knew that it was Guzman who had written the poem, but "she seemed assured that he had. There wasn't any question in her mind about it." Moyles did not tell Kracht she saw Guzman write the poem, and he did not ask her if she was familiar with Guzman's handwriting.

At the conclusion of Kracht's testimony, the court ruled on defense counsel's objections. The court found that the evidence was relevant, and that it was not hearsay because it was not being offered for its truth but rather "as circumstantial evidence that the defendant Mr. Guzman had a motive or a desire to in fact do what the poem suggests." As for the poem's authorship by Guzman, the court reasoned: "[T]he real

[6] The jury was admonished that any testimony about the poem it had heard so far, if it proved to be admissible, would be admissible only against Mr. Guzman and not against Mr. Freitas.

issue is whether there is an adequate foundation for what she [Moyles] indicated . . . That's for the jury to decide. One, the jury could believe Mrs. Moyles'[s] testimony that there was no basis whatsoever for her to conclude that was his poem and in fact it wasn't because she is not even familiar with his writing according to her. On the other hand, we have a statement which was just related by Investigator Kracht which suggests to the contrary. So there's two inferences that can be drawn in terms of the basis of her opinion. Also arguably it's admissible as a prior inconsistent statement as it relates to that particular witness. So I'm going to allow the evidence to remain. The motion to strike is denied."

Under Evidence Code sections 403, subdivision (a)(3) and 1400, subdivision (a), "the proponent of a writing satisfies the burden of establishing the preliminary fact of authentication by introducing evidence that is sufficient for a trier of fact reasonably to find that the proffered writing is one that the proponent claims it to be." (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 2003) § 30.10, pp. 641-642.) " '[L]ike any other material fact, the authenticity of a letter may be established by circumstantial evidence.' " (*Chaplin v. Sullivan* (1945) 67 Cal.App.2d 728, 734.) Moreover, the methods by which writing may be authenticated are not limited by the various means of authenticating a writing specified in Evidence Code section 1411 through 1421. (1 Jefferson, Cal. Evidence Benchbook, *supra*, § 30.22, pp. 645-646; 2 Witkin, Cal. Evid. (4th ed. 2004 supp.) Documentary Evidence, § 7, p. 18.) One method of authenticating a document is by its contents; another is by its location. (See *People v. Gibson* (2001) 90 Cal.App.4th 371, 383 [manuscripts found in defendant's premises authenticated by location and references contained in them.) Once the court finds sufficient evidence of the preliminary fact of authenticity to warrant admission of the writing into evidence, the existence of that fact is subject to redetermination by the jury. (2 Witkin, Cal. Evid., *supra*, Documentary Evidence, § 7, p. 18; *McAllister v. George* (1977) 73 Cal.App.3d 258, 263; *Chaplin v. Sullivan, supra*, 67 Cal.App.2d at p. 734.)

Defendant argues that Moyles's contradicted statement, viewed in light of the notebook's location among another person's belongings and the inclusion of a female person's handwriting in the notebook, was insufficient to authenticate the poem as Guzman's. While we agree these circumstances provided the jury with a basis to reject Guzman's authorship of the poem, we disagree that the court erred in permitting the jury to consider the question. In our view, the crucial content of the poem – "You are going to burn if you touch my girl. I'm the boss." – pointed to Guzman's authorship, rather than Jesse Rios's, or some unknown female's. Furthermore, the location of the notebook in Moyles's house, and the certainty about Guzman's authorship which she conveyed to Kracht, provided sufficient bases for a trier of fact reasonably to find that poem was Guzman's. No error in its admission appears.

The Guns

Defendants objected to, and unsuccessfully moved to strike, Nicole Fierro's testimony that Guzman "liked" weapons and that she had seen him with knives, a gun and a fake hand grenade that he used as a paperweight. Defendant Guzman argues that introduction of this evidence violated his federal due process rights because it was inadmissible and irrelevant character evidence. (See e.g., *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.) The Attorney General implicitly concedes, and we agree, that the trial court erred by refusing to strike the testimony, especially after it sustained a relevancy objection. However, we also agree with the Attorney General that the error was manifestly non-prejudicial, regardless of the prejudice standard applied to the error. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836; *Chapman* v. *California* (1967) 386 U.S. 18.) Fierro's comments were overshadowed by unobjected-to testimony from Moyles that Guzman broke up a party by shooting his .38 caliber pistol into the ground, from Rusich, Moyles and Garner that that defendant owned mini-14s rifles, .25, .38, and .357 caliber pistols, ammunition, gunpowder and pipes and

from Rusich that Guzman would shoot at road signs when he went on drug runs. Fierro's testimony could not have affected the verdict.

C. Refusal to Instruct with CALJIC 3.13

The trial court gave a number of instructions on accomplices, including an instruction that Rusich was an accomplice as a matter of law, that accomplice testimony requires corroboration, and that an accomplice's testimony must be viewed with caution. (CALJIC Nos. 3.10, 3.11, 3.12, 3.14, 3.16.) However the court refused defendant's request to instruct on CALJIC 3.13, which would have informed the jury that "[t]he required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of [his] [her] accomplices, but must come from other evidence."

" 'In enacting section 1111, the Legislature intended to eliminate the danger of a defendant being convicted solely upon the suspect, untrustworthy and unreliable evidence coming from an accomplice, who is likely to have self-serving motives that affect his credibility.' [Citation.] CALJIC No. 3.13, which instructs that one accomplice may not corroborate another, acknowledges this danger in the context of multiple accomplices who may be motivated by self-interest to offer complementary but inaccurate testimony adverse to the defendant." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132.) Defendant complains that without this instruction, the jury could have used Freitas's testimony to corroborate Rusich's testimony, insofar as Freitas implicated Guzman as the instigator of the plot to firebomb the Pequeno house.

The Attorney General counters that giving CALJIC 3.13 in this case would have prejudiced Freitas's defense, and cites *People v. Fowler* (1987) 196 Cal.App.3d 79, 85 for the proposition that "where, as here, a defendant offers exculpatory testimony on his own behalf, while implicating his co-defendant, it is error to give the cautionary instruction." As Guzman points out, the instruction at issue in *Fowler* was not CALJIC 3.13 but rather an instruction that " 'the testimony of an accomplice which tends to

incriminate the other in the offense for which they are on trial should be viewed with distrust.' " CALJIC 3. 18, of which the court's instruction in *Fowler* is a variant, *was* given in this case, without objection. The rationale of the *Fowler* case, however, that any court-sanctioned instruction identifying Freitas as an accomplice would have prejudiced Freitas's defense that he did not aid or abet the arson or murder but only acted as an accessory after the fact, is still applicable here. We are not as sanguine as defendant Guzman, that modifying CALJIC 3.13 to substitute Freitas's name for the word "accomplice[s]" would have cured any prejudice to Freitas. In our view, it would have made matters worse, by singling out his testimony for special scrutiny and all but labeling him an accomplice as a matter of law in the same league as Rusich.[7]

As noted, the trial court did give otherwise comprehensive accomplice instructions, including CALJIC 3.12, which states the following: "To corroborate the testimony of an accomplice, there must be evidence of some act or fact related to the crime which, if believed by itself and without any aid, interpretation, or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged. [¶] However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies. [¶] In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime. [¶] If there is no independent evidence which tends to connect the defendant with the commission of the crime, the testimony of the accomplice is not corroborated. If there is

[7] If modified as defendant Guzman suggests, the instruction would have read "[t]he required corroboration of the testimony of an accomplice may not be supplied by the testimony of codefendant Freitas, or any or all of [his] [her] accomplices, but must come from other evidence."

independent evidence which you believe, then the testimony of the accomplice is corroborated." We agree with the court in *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1219, that "[t]he instructions given covered the accomplice issue fully, and adequately informed the jury that accomplice testimony had to be corroborated by independent evidence. . . . The trial court did not err by failing to give an additional instruction that one accomplice's testimony could not be corroborated by that of a fellow accomplice; such an instruction would have been redundant, given the other instructions given." (*Id.* at p. 1219, fn. 6; see also *People v. Sullivan* (1976) 65 Cal.App.3d 365, 371 [any lack of clarity in CALJIC 3.13 because it states only that the corroboration "must come from other evidence," without making clear the source of that evidence is cured if CALJIC 3.12 (definition of corroborative evidence) is given].) No error appears here.

D. Prosecutorial Misconduct

Defendant Guzman asserts the prosecutor twice committed misconduct: first, by indirectly commenting on his failure to testify, in violation of *Griffin v. California* (1965) 380 U.S. 609; and secondly, by attacking his attorney's integrity. Since counsel did not object to this second asserted instance of misconduct, defendant argues that counsel was ineffective for failing to object. As we explain, we agree that the prosecutor committed misconduct, but we find the errors harmless beyond a reasonable doubt either viewed singly or in combination.

1. Griffin Error

Factual Background

In his opening remarks, after discussing the law of felony murder and special circumstances and the opening statements by both defense counsel. The prosecutor then argued, without objection:

"I'm just gonna [sic] go over some of the evidence in this case. It's a remarkable case from the amount of evidence that I've got, I would submit to you. [¶] First off, the prosecution on this case has provided to you *two out of the three murderers who come in here and tell you themselves from their own mouths what really happened*. . . . Not even Perry Mason gets *two out of the three* to tell you what happened in this case. So you have an extraordinary amount of evidence. You are going to have to weigh who's telling the truth. I don't know what more I could get for you. And those murderers at least are all in agreement I think, that we did it, the three of us. . . . But most importantly I will talk about Mr. Rusich's case and I will submit to you that he's to be believed and he's credible and he's truthful." (Italics added.)

After discussing Rusich's testimony, contrasting it to Freitas's and directing the jury's attention to the corroborative evidence, the prosecutor summed up by saying: "In a nutshell, that's the full evidence you get from *two out of the three actual murderers in this case*. You also get – ." At this point, defense counsel objected and moved for a mistrial. (Italics added.) Outside the presence of the jury, defense counsel argued that the prosecutor "insinuated Mr. Guzman's failure to take the stand and it's prosecutorial misconduct . . . ." When the prosecutor demurred that he was merely "commenting on the evidence there was," defense counsel retorted: "Then why two out of the three? . . . [I]t's unnecessary. . . . [T]he statement this person took the stand and this person took the stand, when he breaks it down two out of the three, that's focusing on Mr. Guzman's failure to testify and that is misconduct." The court disagreed, ruling: "I don't see it focusing on his failure to testify, and we also have the fact Mr. Guzman made statements, obviously not on the stand, but to other people. So to say that that's the account two out of the three murderers to me isn't directing the jury's attention indirectly to the fact that Mr. Guzman didn't testify. So motion for mistrial is denied."

Applicable Legal Principles

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] . . . . [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' (Citation.)" (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

Analysis

Griffin error occurs "whenever the prosecutor . . . comments, either directly or indirectly, upon defendant's failure to testify in his defense." (*People v. Medina* (1995) 11 Cal.4th 694, 755.) Here, the prosecutor's comment did not, in our view, "impliedly invite[] the jury to consider Guzman's failure to testify as *proof* that his actions were criminal." (*People v. Guzman* (2000) 80 Cal.App.4th 1282, 1288; italics added.) Nevertheless, we agree with defendant that by asking the jury to ponder the contrast between the two who testified and the one who did not, the prosecutor brought Guzman's failure to testify into sharper focus than might otherwise have been the case. We think it reasonably likely that such focus could have led some jurors to draw adverse inferences from Guzman's assertion of his Fifth Amendment privilege, even though, as the Attorney General points out, the court instructed the jury not to do so in CALJIC 2.60 and 2.61. The prosecutor's comments were improper.

In our view, the error here was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18.) In *People v. Guzman* the Court of Appeal found the *Griffin* error there reversible because the prosecutor's comments on the defendant's

failure to testify were "relentless" and the jury's split verdict indicated that the jury had doubts about the testimony with which the defendant's silence was contrasted. (*People v. Guzman, supra,* 80 Cal.App.4th at p. 1290.) This is not such a case. Even considering the objected-to comments together the comments to which defendant did not object, we find that the references to "two out of the three actual murderers" did not " 'serve to fill an evidentiary gap in the prosecution's case,' or 'at least touch a live nerve in the defense, . . .' " (*People v. Vargas* (1973) 9 Cal.3d 470, 481.) We conclude the comments "could have had no significant impact upon the jurors and were harmless beyond a reasonable doubt." (*Ibid*.)

2. Disparaging Defense Counsel

Factual Background

Much of defense counsel's argument to the jury focused on the questions raised by the perceived gaps in Detective Callahan's investigation or the in the prosecutor's presentation of his case against Guzman. For example, with respect to David Pequeno's testimony he asked: "Where is [the person] who witnessed the fight? Where is the store owner? Where are the people who were passengers in the car, the car that Gilbert rammed because [he] was so enraged he broadsided that car?" He argued that Detective Callahan was "over his head in this type of case. He's not evil. He's not lying. He's not perjurious. I'm not saying that and I did not say that in my opening. What I said was he had certain preconceptions about the case and everything that fit those preconceptions is what he focused on." Defense counsel concluded his remarks as follows: "See what the D.A. has to say about it, but your job is to ask him why. Your job is to ask him why this necessary investigation was not done. Your job is to examine that motive, not just accept it. Your job is to examine the fact that everybody in Gilroy knows Gilbert did it. You don't just accept that at face value. Look and see what sort of evidence the District Attorney provided, if any, and examine that. And upon careful examination of all that

testimony of every witness who testified here, you will find that the D.A. has not met his burden of proof and he can't answer those necessary questions. Consequently you must find Gilbert not guilty. Thank you very much."

Evidently these comments prompted the prosecutor to respond with the comments to which defendant now objects for the first time on appeal: "You can certainly ask yourself questions about the evidence in this case. That's certainly fair. But to sit there and try to create a defense for Mr. Guzman by imagining that some other people did this when there's not any evidence, nothing here to suggest that, is fabricating something, is guessing. [¶] You know you would be in trouble if you violated the judge's instructions to you, which you have heard a number of times. . . . [¶] 'You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence.' [¶] You've already heard that about twice a day. That's the law. That's your role. *For [defense counsel] to suggest otherwise is improper. You'd be violating your oath, potentially getting yourselves into a lot of trouble. But that's what he has to do in order to get off this very obviously guilty man, Mr. Guzman."* (Italics added.) Discussing some of the witnesses who did testify, the prosecutor argued "I don't know why [defense counsel] would bother to mislead you . . ." and "[Defense counsel] wants to mislead you by talking about" two of the witnesses. And again, as to one of the two witnesses, he reiterated: "I don't know why [defense counsel] would intentionally mislead you." Finally, as to Guzman's counsel, he concluded: "[Defense counsel] cannot honestly discuss this case with you, and he faults Detective Callahan." As to defendant Freitas's attorney, the prosecutor argued: "[Defense counsel] suggests to you . . . that Miguel Garcia verifies Freitas in his lies. That's misleading. That's not telling you the truth." As noted, no objections were lodged against any of these comments.

Applicable Legal Principles

Ordinarily, claims of prosecutorial misconduct are forfeited by the failure to object, unless an admonition would not have cured the harm, or an objection would have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432.) Here, defendant does not argue that his case comes within either of these exceptions. Rather, he argues that counsel was ineffective for failing to object. However, as our Supreme Court has "noted repeatedly, the mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel." (*Id.* at p. 433.) To establish a claim of ineffective assistance of counsel, the defendant must show "both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Price* (1991) 1 Cal.4th 324, 440; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) However, when the defendant "has not satisfied the second part of the test, we need not consider whether trial counsel's performance was deficient." (*People v. Price* (1991) 1 Cal.4th 324, 440.) In addition, to prevail on direct appeal, the defendant must also show that "counsel was asked for an explanation and failed to provide one, or . . . there simply could be no satisfactory explanation" for counsel's failure to object. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Analysis

In this case the Attorney General defends the prosecutor's conduct by arguing that it was merely a rebuttal to defense counsel's remarks. Whether it was rebuttal or not, as our Supreme Court has advised, "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) We think there is a reasonable likelihood that the jury understood

the prosecutor's comments exactly that way, although we note that arguably more egregious comments have not been found to have crossed the line into misconduct. (See e.g., *People v. Williams* (1996) 46 Cal.App.4th 1767, 1781-1782 [defense counsel had to " 'obscure the truth' "]; *People v. Bell* (1989) 49 Cal.3d 502, 538 [defense counsel's job is to " 'throw sand in your eyes' " and "get his man off"]; see also *People v. Gionis* (1995) 9 Cal.4th 1196, 1216; *People v. v. Breaux* (1991) 1 Cal.4th 281, 305.)

In any event, we need not decide whether the prosecutor's remarks constituted misconduct because we are convinced the comments could not have affected the outcome of the trial either viewed singly or in combination with the prosecutor's comments about "two out of three actual murderers." (*People v. Price, supra*, 1 Cal.4d at p. 440.)

Finally, we are not convinced that there is no explanation for counsel's failure to object. In our view, this is exactly the sort of situation in which competent counsel might make a tactical decision to refrain from objecting, if in his or her estimation the client had more to lose than to gain by challenging the prosecutor's incivility. For these reasons, we reject defendant's ineffective assistance of counsel claim.

3. Cumulative Prejudice

Finally, defendant contends that even if each instance of misconduct was not, in and of itself, prejudicial, in combination with the other errors, cumulative prejudice requiring reversal has been demonstrated here. (See *People v. Holt* (1984) 37 Cal.3d 436.) We disagree. Except as noted above in our discussion of the prosecutor's comments during closing arguments, and of the admission of Fierro's testimony about Guzman's attitude towards weapons, we have found no error. In our view, even in combination, the prosecutor's comments and Fierro's testimony were harmless beyond a reasonable doubt, given the accomplice testimony, the strong corroborative evidence, and defendant's own numerous admissions to various persons. (*Chapman v California*, *supra*, 386 U.S. 18.)

E. Sufficiency of the Evidence to Support the Arson-Murder Special Circumstance

Guzman contends there was insufficient evidence to support the finding of the arson-murder special circumstance. We apply the substantial evidence rule to defendants' challenge to the special circumstance finding. "The rules governing sufficiency of the evidence are as applicable to challenges aimed at special circumstance findings as they are to claims of alleged deficiencies in proof of any other element of the prosecution's case. [Citation.]" (*People v. Morris* (1988) 46 Cal.3d 1, 19, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543-545.) "We must therefore determine here whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have concluded that defendant had a purpose for the arson apart from the murder. [Citations.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 183.)

Guzman argues there was no evidence of "an independent felonious purpose to commit arson or that [he and Freitas] killed to advance such a purpose." In support of this argument, defendants point to the prosecutor's argument to the jury. When arguing the felony-murder rule as a basis for defendants' criminal liability for the murders, the prosecutor argued that the jury need only find that Guzman intended to commit arson; there did not also have to be proof that defendants "intended to kill anyone." However, when arguing the felony-murder special circumstance, which required proof of an intent to kill, the prosecutor argued that Guzman intended to kill David Pequeno by firebombing his house, but killed Pequeno's family by mistake.

Defendant acknowledges that under the special circumstance statute, "[a] felony-murder special circumstance, such as arson murder, may be alleged when the murder occurs *during* the commission of the felony, not when the felony occurs during the commission of a murder." (*People v. Mendoza, supra,* 24 Cal.4th at p. 182, italics added.) To paraphrase succinctly, "[t]he [arson]-murder special circumstance applies to a

murder in the commission of a[n arson], not to a[n arson] committed in the course of a murder." (*People v. Marshall* (1997) 15 Cal.4th 1, 41.) "Thus, to prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder. [Citation.]" (*People v. Mendoza, supra,* 24 Cal.4th at p. 182.) To meet this burden, the prosecution may show that that the defendant concurrently harbored an intent to kill *and* an intent to commit the underlying felony. (*Id.* at pp.183-184; *People v. Raley* (1992) 2 Cal.4th 870, 903; *People v. Clark* (1990) 50 Cal.3d 583, 608-609.)

Defendant disputes the existence of substantial evidence supportive of concurrent goals or objectives. He argues that the evidence of Guzman's " 'repetitive pattern of harassing behavior' " is insufficient to show that, at the time of the crimes, he harbored "any intent other than to kill [David] Pequeno and to commit that killing by arson." He also argues that Guzman's post-murder admission, that David Pequeno would suffer for the rest of his life, does not support a finding that Guzman had a concurrent intent to make Pequeno suffer, because there was no evidence that Guzman knew Pequeno's grandparents and uncle would be killed in the fire, or that he killed them in order to make Pequeno suffer.

We view the facts differently. The evidence of the feud between David Pequeno and Guzman, and of the numerous and escalating acts of harassment, from phone calls to visits, to armed confrontations, all accompanied by threats to kill Pequeno *or* his family members, demonstrate an intent on Guzman's part to harm David Pequeno in any way he could, if he did not kill him. From this evidence, and from the evidence that after the murders Guzman expressed his satisfaction with the suffering Pequeno would experience for the rest of his life, the jury was entitled to draw the conclusion that Guzman had intended to kill Pequeno if he could, but if he did not accomplish that goal, he at least intended to cause Pequeno considerable anguish by burning down his house or killing his

family, just as he had caused Pequeno to suffer to a lesser extent by his threats, harassing phone calls, visits, and the armed confrontation at the liquor store. In our view, the evidence is sufficient to establish that defendants burned down David Pequeno's house with "independent, albeit concurrent, goals." (*People v. Clark, supra,* 50 Cal.3d at p. 609, fn. omitted.) We therefore reject defendant's claim of evidentiary insufficiency.

II. Freitas's Contentions

Freitas argues that the trial court made a number of instructional errors that undermined his defense theory, that he aided and abetted the arson only *after* the firebomb was thrown, and therefore was not liable under the felony murder rule for the murders. As to all of his assertions, our principle task is to determine " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution" or California law. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Clair* (1992) 2 Cal.4th 629, 662-663.) We determine the correctness of the challenged instruction "in the context of the instructions as a whole and the trial record," and not " 'in artificial isolation.' " (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Furthermore, "[t]he absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." (*Ibid.*, quotation marks and citation omitted.) Finally, "[w]e conduct independent review of issues pertaining to instructions." (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411, citing *People v. Waidla* (2000) 22 Cal.4th 690, 733, 737 [lesser included offense instructions].)

We will apply these general principles to our analysis of Freitas's specific claims. First, however, we review the trial court's instructions to the jury on the elements of murder to place Freitas's arguments in their proper context.

Using standard CALJIC instructions, the trial court correctly instructed the jury that murder is a killing committed either with express malice *or* during the commission of

an arson. (CALJIC 8.10, 8.11.)[8] It then instructed the jury on three theories of first degree murder. First, the court instructed that "[a]ll *murder* which is perpetrated by any kind of willful, deliberate, and premeditated killing *with express malice aforethought* is murder of the first degree." (CALJIC 8.20, italics added.) Next, the court instructed that "[t]he unlawful *killing* of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime of arson *is murder of the first degree*." (CALJIC 8.21; italics added.) Finally, the court instructed that "[*m*]*urder* which is perpetrated by means of a destructive device or explosive is murder of the first degree. A Molotov cocktail is an explosive . . . device." (CALJIC 8.22; italics added.) From these instructions, the jury was entitled to conclude that (1) a premeditated, first degree murder, must be based on a killing done with express malice; (2) an arson first degree murder does not require express malice and (3) an explosive device first degree murder can be based on either an express malice or arson-based murder.

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[8] CALJIC 8.10, as modified for this case, provided in relevant part: "Every person who unlawfully kills a human being with malice aforethought or during the commission or attempted commission of arson . . . is guilty of the crime of murder in violation of [] section 187. . . . In order to prove this crime, each of the following elements must be proved: [¶] One, a human being was killed; [¶] Two, the killing was unlawful; [¶] And, three, the killing was done with malice aforethought or occurred during the commission or attempted commission of an arson."

CALJIC 8.11, as modified for this case, provided in relevant part: " 'Malice' may be either express or implied. Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. [¶] The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede, rather than follow, the act." Properly, the jury was not instructed on implied malice.

A. First Degree Murder by Use of a Destructive Device

As we understand Freitas's first argument, he contends that the trial court misinstructed the jury that *murder,* proved by way of the arson-felony-murder rule, can be elevated to first degree murder by virtue of the use of a destructive device. He argues that the trial court's instruction on this theory of first degree murder liability was erroneous because California law does not recognize arson-murder-explosive device-first degree murder liability, citing *People v. Morse* (1992) 2 Cal.App.4th 620 for that proposition. He does not argue that this asserted error requires reversal.

Inasmuch as defendant does not assert this claim of error as a ground for reversal, we need not address it. Because the Attorney General addresses defendant's claim on its merits, however, we also do so.

First, we are not convinced it is reasonably likely that a jury given the instructions summarized above, on the facts adduced at this trial, would have concluded that arson, rather than express malice, was the basis of murder which becomes murder of the first degree through use of a destructive device. Here, the instructions did not tell the jury that the use of a destructive device supplied all that was necessary for murder, nor did the prosecutor so argue.[9] As the instructions made clear, proof of arson alone supplied all that was necessary to make the killings (1) murders and (2) in the first degree. Thus, there was no need for the jury to resort to a circuitous arson-destructive device route to

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[9] The prosecutor argued: "Only three things really need to be proven. Three elements. Really very simple. That there's unlawful killing, that this killing occurred during the commission of an arson, and that the people who did this arson did the killing, had the intent just to do the arson. [¶] You will see under the Felony Murder Rule, and we'll talk about this later, I don't have to prove that they intended to kill anyone. It could have been entirely accidental. It makes your job easy. . . . [¶] The other option to prove that both Mr. Guzman and Mr. Freitas planned this or premeditated this, I think obviously it's shown from the facts it didn't happen spontaneously. They had to prepare the bomb, organize three people, et cetera. [¶ Finally another way you can arrive at this conviction . . . for all three deaths is that this is a murder by explosive device or bomb to simplify it. Obviously that happened under any of these three theories of first degree murder."

first degree murder. On these facts, the destructive device theory of first degree murder would seemingly come into play only if the jury found express malice, but failed to further find either premeditation or arson.

Second, even if the instructions did establish a theory of first degree murder liability based on arson and use of a destructive device, we are not persuaded by defendant's authorities that such a theory violates section 189. *People v. Morse* does not hold that it is error to instruct the jury that a killing during the commission of one of the felonies enumerated in section 189 is murder, and that such a murder, if committed by means of a destructive device, is first degree murder. *Morse* holds only that it is error to instruct the jury that "they could use the crime of possession of a destructive device *twice,* first to find he had committed second degree murder, and second to convert that murder into murder of the first degree." (*People v. Morse*, *supra*, 2 Cal.App.4th at p. 654.) None of the other cases cited by Freitas is any more on point. In *People v. Catlin* (2001) 26 Cal.4th 81, 149, the defendant claimed the trial court had erred in giving CALJIC 8.11, which references express malice, when the parties had agreed that no definition of express malice murder was required and the trial court instructed only on implied malice. Mystified by the prosecutor's agreement to forego express malice instructions in that case, the Court observed: "We surmise that the prosecutor agreed with the proposal because for each count, the prosecution was attempting to prove murder by poison, which constitutes a first degree murder whether malice is express or implied. [Citations.]" (*Ibid.*) No instruction on felony murder was at issue in *Catlin*. This statement in *Catlin* does not establish that murder by destructive device can only be based on malice murder. Similarly, neither *People v. Phillips* (1966) 64 Cal.2d 574, 584, overruled on another point in *People v. Flood* (1998) 18 Cal.4th 470, 480 [erroneous second degree felony-murder instruction based on grand theft withdrew malice issue from jury], or *Hamby v. Roe* (9th Cir. 2002) 44 Fed.Appx. 878, 879-880 (unpublished), establishes that first degree murder by destructive device can only be premised on malice

murder. We therefore agree with the Attorney General that "the jury was properly instructed that a killing during the commission of arson constituted murder, and that murder committed by means of a destructive device constituted first-degree murder."

Finally, even if there was error, it was harmless beyond a reasonable doubt in view of the overwhelming evidence that the killings occurred during the commission of arson.

B. Failure to Fully Instruct on Elements of Conspiracy Liability

Defendant next contends the trial court committed reversible federal constitutional error, as well as state law error, when it failed to instruct, sua sponte, on all the elements of conspiracy, after giving CALJIC 8.26. As we explain below, we are not convinced that the court was required to so instruct, sua sponte, but we do find that even if the court should have so instructed, any error was harmless beyond a reasonable doubt.

The trial court gave only one instruction that touched on conspiracy liability for felony murder. CALJIC 8.26, as given in this case, informed the jury: "If a number of persons *conspire* together to commit arson and if the life of another person is taken by one or more of them in the perpetration of or an attempt to commit that crime and if the killing is done in furtherance of the common design and to further that common purpose or as an ordinary and probable result of the pursuit of that purpose, all of the *co-conspirators* are equally guilty of murder of the first degree whether the killing is intentional, unintentional, or accidental." (Italics added.)[10]

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[10] The instructions as a whole included only two other fleeting references to conspiracy or conspirators: (1) "An accomplice is a person who is subject to prosecution for the identical offenses charged in Counts 1, 2 and 3 against the defendants on trial by reason of aiding and abetting or being a member of a criminal *conspiracy*" (italics added); and (2) "If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or *co-conspirator*, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless

Defendant Freitas argues that even though he was not formally charged with conspiracy, once the court partially instructed on the concept of conspiracy liability for felony murder, the court was required to instruct on all the elements of conspiracy, sua sponte. He analogizes to the rule established in *People v. Prettyman* (1996) 14 Cal.4th 248, 268-269 that, "where the prosecution seeks to prove a defendant's guilt" for a crime that an accomplice commits, as a natural and probable consequence of the crime that the defendant aided and abetted, the court "must instruct on the elements of the crime aided and abetted." He also argues that the error in failing to instruct on all the elements of the uncharged conspiracy reduced the prosecution's burden of proof in violation of the federal constitution (*Sandstrom v. Montana* (1979) 442 U.S. 510, 518, fn.7), and the error is not harmless beyond a reasonable doubt. (*Yates v. Evatt* (1991) 500 U.S. 391, 404, disapproved on another point in *Estelle v. McGuire*, *supra*, 502 U.S. 62, 72.)

The Attorney General counters first that defendant has waived the claim of error because conspiracy instructions constituted an amplification of correct instructions which could have been but were not requested. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Secondly, he argues that even if the trial court erred by failing to instruct the jury on the elements of the crime of conspiracy (i.e., an agreement, specific intent to commit the agreed upon offense, and an overt act), the error is harmless in light of the felony murder special circumstance finding.

Preliminarily, we note that defendant's analogy to *Prettyman* is faulty. *Prettyman* holds that an instruction on natural and probable consequences should identify the *target* crime from which the natural and probable consequences flow and its elements should be explained to the jury. *Prettyman* does not hold that the court must instruct on conspiracy

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indifference to human life and as a major participant aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of arson which resulted in the death of a human being; namely, Higinio Pequeno, Guadalupe Pequeno, or Daniel Pequeno." (Italics added.)

whenever it instructs on aiding and abetting. Here, that target crime was arson, and the jury was properly instructed on all the elements of arson (CALJIC 14.80) as well as on the relationship of arson to the natural and probable consequences doctrine. (CALJIC 3.02.)

We are also not persuaded that CALJIC 8.26 is so much a statement of conspiracy liability per se as it is a statement of "felony-murder complicity" (*People v. Pulido* (1997) 15 Cal.4th 713, 724) as applied to a confederate of the actual killer. (See generally, *id.* at p. 719-721 [comparing variations on statement of rule]; *People v. Martin* (1938) 12 Cal.2d 466, 472.) As the *Pulido* Court observed: "For purposes of complicity in a cofelon's homicidal act, '[t]he conspirator and the abettor stand in the same position.' [Citation.] In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors)." (*People v. Pulido*, *supra*, 15 Cal.4th at p. 724.)

Furthermore, our Supreme Court has suggested that that where the word "conspiracy" is used "in its common and nontechnical meaning of an agreement to do harm . . . the existence *vel non* of a 'conspiracy' in the technical sense of that term [is] not a material issue in the guilt phase . . . [and] no request for a definition was made," there is no error in failing to define the term. (*People v. Williams* (1998) 45 Cal.3d 1268, 1315; but see *People v. Earnest* (1975) 53 Cal.App.3d 734 [court has sua sponte duty to define conspiracy where jury is instructed on Evid. Code § 1223].) Here, there was no request for a definition. Moreover, in our view, instruction on the specific elements of conspiracy would not have spelled the difference between acquittal and conviction, given that the jury was properly instructed on aiding and abetting. Although "the law of conspiracy cannot be automatically analogized to the law of aiding and abetting," defendant's argument fails to "explain why the differences between these two species of complicity (chiefly the existence or nonexistence of an agreement) should affect the

liability of a late joiner for a homicide committed by others in the criminal enterprise before his or her joinder." (*People v. Pulido, supra,* 15 Cal.4th at p. 725; see also *People v. Billa* (2003) 31 Cal.4th 1064, 1071 & fn. 5 ["In *People v. Pulido* [citation] we identified two somewhat different lines of authority regarding the exact scope of accomplice liability. As in *Pulido*, we need not reconcile or choose between these lines because the result here would be the same under either"].)

Furthermore, while it is true the cases hold that instruction on the elements of conspiracy *may be properly given* when the crime of conspiracy is not charged, but the prosecution rests on conspiracy liability, (*People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1134 and cases cited therein), defendant has not directed our attention to any case which holds that under such circumstances conspiracy instructions *must* be given sua sponte. *People v. Earnest,* cited above, does not so hold. Failure to furnish authority on a particular point allows the court to deem it waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

On the other hand, we agree with defendant that "[e]ven if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) Assuming arguendo that CALJIC 8.26 constituted a partial instruction on conspiracy, we find defendant has not waived the point.

However, we need not decide here whether the court had a sua sponte duty to instruct on the elements of conspiracy because even if the trial court should have instructed that a conspiracy requires an agreement, a specific intent to commit the target crime, and an overt act, we do no see how the defendant was harmed by the failure to so instruct, given the array of aiding and abetting instructions before the jury[11] and the jury's

[11] The jury was given CALJIC 3.00 (Principles Defined), 3.01(Aiding and Abetting Defined), 3.02 (Principles – Liability for Natural and Probable Consequences); 3.10 (Accomplice Defined), 8.27 (First Degree Felony Murder – Aider and Abettor),

special circumstance findings. Specifically, under the special circumstance instructions given, if the jury found that Freitas was *not* the actual bomb-thrower but rather an aider and abettor or co-conspirator, it could not find the multiple-murder and arson-murder special circumstances true unless it found that (1) he either aided and abetted the *murder*, *with the intent to kill,* or (2) he acted as *a major participant in the arson*, with reckless indifference to human life (see CALJIC 8.80.1). In addition, in order to find the arson murder circumstance true, the jury had to believe that "[t]he murder was committed *while [he] was engaged in or was an accomplice in the commission of an arson*." (Italics added.)

We think it is clear beyond a reasonable doubt that any rational jury which made the necessary factual findings on the special circumstance allegations, on the basis of aiding and abetting instructions, must also have found that defendant specifically intended to commit the arson.[12] Thus, even if the jury had been instructed on the elements of conspiracy, and had made findings that no prior agreement or overt act occurred, those findings would not have resulted in a different verdict. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [elemental omission in instruction can be harmless beyond a reasonable doubt where other facts found by the jury are the "functional equivalent" of the omitted, misdescribed, or presumed element]; *Neder v. United States* (1999) 527 U.S. 1, 13-14, 18 [rejecting "functional equivalence" test as too narrow, in

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8.80.1 [(1997 Revision) Post June 5, 1990 Special Circumstances – Introductory ([] §190.2)]; CALJIC 8.81.17 [(Special Circumstances - Murder in Commission of Arson (§ 190.2(A)(17)].)

[12] The jury returned the following findings: "Having found the defendant MICHAEL CARL FREITAS Guilty of First Degree Murder, we find the allegation that the defendant, MICHAEL CARL FREITAS, committed the afore mentioned crime while he was engaged in the commission, the attempted commission, and the immediate flight after the commission and attempted commission of a felony, ARSON, to be true." Identically worded findings were returned against Guzman.

favor of broader inquiry whether a rational jury would have found the defendant guilty absent the error]; *People v. Sedeno* (1974) 10 Cal.3d 703, 721[no prejudice if "the factual question posed by the omitted instruction was necessarily resolved adversely to defendant under other, properly given instructions"], overruled on other points in *People v. Breverman* (1998) 19 Cal.4th 142, 165 and *People v. Blakeley* (2000) 23 Cal.4th 82, 89; *People v. Pulido, supra*, 15 Cal.4th at p. 726 [utilizing *Sedeno* test].)

C. Failure to Instruct on Late Joiner's Lack of Liability for Felony Murder

Defendant contends that the trial court had a sua sponte duty to instruct the jury on the principle that "[a] conspirator cannot be held liable for a substantive offense committed pursuant to a conspiracy if the offense was committed *before* he joined the conspiracy." (*People v. Marks* (1988) 45 Cal.3d 1335,1345; *People v. Weiss* (1958) 50 Cal.2d 535, 554, superseded by statute on another ground as stated in *People v. Griffin* (1991) 235 Cal.App.3d 1740, 1746; *People v. Pulido, supra*, 15 Cal.4th at pp. 723-724 ["an accomplice's complicity under the California felony-murder rule . . . does not extend to killings committed before the accomplice joined the felonious enterprise"]; *People v. Cavitt* (2004) 33 Cal.4th 187.) This principle of law is encapsulated in CALJIC 6.19,[13] which defendant did not request. He further contends that the failure to so instruct prejudiced him because a properly instructed jury could have found that Guzman threw the firebomb and Freitas joined the conspiracy only after that was done, but instead the jury was erroneously instructed on a "conspiracy theory of retroactive liability for murder."

[13] CALJIC 6.19 provides: "Every person who joins a conspiracy after its formation is liable for and bound by the acts committed and declarations made by other members in pursuance and furtherance of the conspiracy during the time that [he] [she] is a member of the conspiracy. [¶] A person who joins a conspiracy after its formation is not liable or bound by the acts of the co-conspirators or for any crime committed by the co-conspirators before that person joins and becomes a member of the conspiracy."

Initially, we disagree that the jury was instructed that defendant Freitas could be convicted of felony murder even if he only joined the conspiracy after the firebomb was thrown by someone else. CALJIC 8.26 did not so instruct. CALJIC 8.26 begins with the conditional statement, "*If* a number of persons conspire together to commit arson . . ." In our view this statement clearly conveys there must be joinder *in the commission of* the arson, not simply in its aftermath. Similarly, the thrust of CALJIC 8.27[14] is that there must be joinder in the act that constitutes the arson – here, the throwing of the firebomb – or foreknowledge of the actor's criminal purpose and joinder in the actor's intent to commit arson, before criminal liability for deaths resulting from the act of arson can attach.

Furthermore, these were not the only instructions on felony-murder complicity given the jury. On the contrary, the jury was fully instructed on aiding and abetting liability which made it clear that if the jury determined Freitas unwittingly drove his confederates to the scene of the crime, and only after the firebomb was thrown learned of their criminal purpose, but then knowingly and intentionally aided them by driving them away from the scene, he still could not be found guilty of murder. This defense theory was not only implicit in the aiding and abetting instructions; it was also implicit in the accessory-to-a-felony instruction[15] that was given at his request. That instruction made it

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[14] CALJIC 8.27, as given in this case, provided: "If a human being is killed by any one of several persons engaged *in the commission of the crime of arson*, all persons who either directly and actively *commit the act constituting that crime* or who, at or before the time of the killing, with the knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating *the commission of the offense,* aid, promote, encourage, or instigate, by act or advice *its commission,* are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental." (Italics added.)

[15] The jury was instructed with CALJIC 6.40 [Accessories (§ 32)]: "Every person who, *after a felony has been committed*, harbors, conceals, or aids a principal in that felony, with the specific intent that the principal may avoid or escape from arrest, trial,

clear that the liability of an accessory comes into play only *after* a felony has been committed and logically suggests that an accessory is not liable for the earlier felony.

Second, we question whether the trial court had a duty to instruct sua sponte on late joiner liability, or CALJIC 6.19. It is true that in *People v. Marks,* our Supreme Court suggested that an instruction on late joiner liability was a "general principle[] of law relevant to the issues raised by the evidence" warranting sua sponte instruction where there was "evidence suggesting that defendant did not join the alleged conspiracy until after the murder." (*People v. Marks*, *supra*, 45 Cal.3d at p. 1345.) On the other hand, developments in the law of sua sponte and pinpoint instructions postdating *Marks* suggest that a specific instruction on late joiner liability should be a requested instruction. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) We note that an analytically similar instruction in the robbery context, an instruction on after-acquired intent to steal, must be requested. (*People v. Valdez* (2004) 32 Cal.4th 73, 111-112; see also *People v. Hines* (1997) 15 Cal.4th 997, 1049 [the *Pulido* court did not "decide whether the trial court was obligated to instruct on late joiners on its own initiative . . . ."]

In any event, we need not decide whether the instruction should have been given sua sponte, because any error in the failure to give it at all was harmless beyond a reasonable doubt, given the jury's findings on the special circumstance allegation that he was involved in the commission of the arson. (*Chapman v. California*, *supra*, 386 U.S.

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conviction or punishment, having knowledge that the principal has committed that felony or has been charged with that felony or convicted thereof, is guilty of the crime of accessory to a felony in violation of [] section 32. [¶] In order to prove this crime, each of the following elements must be proved: [¶] A felony was committed; [¶] The defendant harbored or a person harbored, concealed, or aided a principal in that felony with the specific intent that the principal avoid or escape arrest, trial, conviction, or punishment; [¶] And the defendant did so with knowledge that the principal committed the felony or was charged with having committed the felony or was convicted of having committed the felony." (Italics added.)

18; *Neder v. United States, supra*, 527 U.S. at p. 18.) In our view, those findings demonstrate that the jury rejected defendant Freitas's late joiner defense theory.

D. Error in the Version of CALJIC 8.27 Given to the Jury

As noted, the trial court instructed the jury with the original version of CALJIC 8.27, which imposes first degree felony murder liability on any confederate "who, *at or before the time of the killing*," aids and abets the underlying felony. On appeal, defendant argues that the trial court should have instead instructed the jury with a modification of the 1996 version of CALJIC 8.27. Unmodified, the later version of CALJIC 8.27 would have informed the jury that "[i]n order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the [felony/arson] at the time *the fatal [blow was struck] [wound was inflicted]*." Defendant implicitly acknowledges that neither of those formulations would have quite fit the factual scenario here, and so he argues instead that the trial court should have given a version of CALJIC 8.27 that substituted the phrase "at the time the fatal act or fatal action was committed" for the "fatal blow struck/wound inflicted" language. Defendant argues that because the victims died some time after the firebomb ignited the house, but probably during the time he was knowingly and intentionally driving his confederates to a safe haven, under the instructions given, the jury could have concluded that defendant Freitas was guilty of first degree felony murder because he began to aid and abet the arson before the victims actually died. The 1996 version, he argues, would have more clearly informed the jury that to be guilty of murder, he would have had to be already aiding and abetting the arson at the time the "fatal blow was struck," that is, at the time the firebomb was thrown.

Preliminarily we note that while the record reflects that defendant apparently requested [16] the 1996 version of CALJIC 8.27, it does not reflect any request to modify that version in the manner defendant now asserts it should have been modified. Thus, to the extent he argues that the trial court should have instructed on the modified language, that claim is waived. (*People v. Guiuan, supra*, 18 Cal.4th 558.) To the extent he argues the 1996 version, unmodified, would have been more correct than the version given, we review his claim but reject it on the merits.

The use note to CALJIC 8.27 indicates that the 1996 version was added in response to *People v. Pulido, supra,* 15 Cal.4th 713. In *Pulido*, the court expressed concern that in robbery cases, where the jury is instructed that a robbery continues while the robber flees, until he or she reaches a place of temporary safety with the stolen goods, the combination of instructions might mislead the jury into reasoning "that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule. As we have seen, that implication would be incorrect." (*Id.* at p. 728.) The court suggested that to avoid confusion, CALJIC 8.27 could be modified to include the phrase "at or before the time of the killing" – the very phrase to which defendant now objects. (*Id*. at p. 729, italics omitted.) The court also suggested that "[a]lternatively, CALJIC No. 8.27 could be qualified by telling the jury directly, through a separate supplemental instruction," about the rule exempting late joiners from liability. (*Ibid*.) The court also noted: "There may also be other proper modifications or special instructions that would convey the same rule." (*Ibid.*) The court declined to decide whether the failure to modify the instruction was error, in view of the lack of prejudice. (*Id.* at p. 730.)

[16] The record reflects there was a discussion about which version of CALJIC 8.27 should be given. The Attorney General acknowledges, and we agree, that defense counsel probably requested the 1996 version, and that the court denied that request.

Defendant argues that "no instruction *prohibited* the jury from considering arson a continuing offense, in the sense that escape was included within it." In our view, it is more to the point that here, unlike *Pulido*, *no* instructions gave the jury the impression that the crime of arson continued through escape and until the perpetrators reached a place of safety. Here, the jury was instructed that arson is committed when a person "sets fire to, or burns, or causes to be burned, or aids . . . the burning of any structure and by so doing causes great bodily injury." (CALJIC 14.80.) We do not think it is reasonably likely that the jury would have concluded, on its own, on the basis of this instruction, that the crime of arson encompasses escape. Thus, the potential for confusion engendered by other, proper instructions that was present in *Pulido* was not present here. Defendant also argues that the instruction on accessories requested by defendant was "abstract," and "of no consequence," but in our view, it is precisely the sort of supplemental instruction contemplated by the *Pulido* court. It conveyed the idea that late joiners – that is, accessories – are not guilty of murders that were committed by their confederates before they joined the criminal enterprise. Under all of the instructions given, we think there is no reasonable likelihood the jury misinterpreted CALJIC 8.27, as given, to mean that late joiners *were* guilty of such murders.

In any event, once again we need not decide whether the trial court committed instructional error because the jury's findings on the special circumstance allegations demonstrate beyond a reasonable doubt that the jury rejected defendant's late joiner defense theory and found that he was knowingly and actively involved in the commission of the arson itself. (*People v. Pulido, supra,* 15 Cal.4th at p. 727; *People v. Hines*, *supra*, 15 Cal.4th at p. 1050; *Chapman v. California*, *supra*, 386 U.S. 18.)

E. Ineffective Assistance of Counsel

Defendant Freitas argues that his counsel was ineffective for failing to object to the plea and immunity agreement and order under which Rusich testified at trial. He

asserts the order granting Rusich immunity did not actually require Rusich to testify *truthfully* at trial, and was therefore objectionable on that basis. As we explain, we do not share the defendant's view of the agreement or the order; nor do we find any other objectionable defect in it. Therefore we reject defendant's claim of ineffective assistance of counsel.

The agreement at issue was attached as a proposed order to the district attorney's petition, pursuant to section 1324,[17] requesting that the court grant Rusich transactional immunity for "testifying truthfully in the trial." The proposed order, as signed by the court, granted Rusich "use and derivative immunity from any and all prosecution or penalties or forfeitures for any information he provides to law enforcement in cooperating with the investigation of cases FF090933, 210642, and FF092948. Such immunity prohibits use of any information provided by Mr. Rusich against him in any future trial, including any impeachment or rebuttal evidence. Use and derivative immunity is granted irrevocably as long as Mr. Rusich cooperates with law enforcement in answering questions. [¶] This order shall be sealed until such time as Mr. Rusich has been

[17] Section 1324 provides, in relevant part: "In any felony proceeding . . . if a person refuses to answer a question or produce evidence of any other kind on the ground that he or she may be incriminated thereby, and if the district attorney . . . in writing requests the court . . . to order that person to answer the question or produce the evidence, a judge shall . . . order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he or she would have been privileged to withhold the answer given or the evidence produced by him or her, no testimony or other information compelled under the order or any information directly or indirectly derived from the testimony or other information may be used against the witness in any criminal case. But he or she may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. Nothing in this section shall prohibit the district attorney or any other prosecuting agency from requesting an order granting use immunity or transactional immunity to a witness compelled to give testimony or produce evidence."

interviewed by law enforcement and the District Attorney's Office has determined that its investigation of the truthfulness of his statement is complete. [¶] If the information provided by Mr. Rusich is determined to be truthful by the District Attorney's office, then Mr. Rusich will be granted transactional immunity in these cases upon the condition that he testifies as a witness at trial in case number FF090933. In return Mr. Rusich would plead guilty to an Amended Information in . . . FF090933 stating a violation of section 32, for which he would be sentenced to a three year state prison term. The remaining charges in cases FF090933 and FF092948 would be dismissed. [¶] The witness may be prosecuted or subjected to penalty or punishment for any perjury, false swearing, or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence in accordance with this order."

Rusich testified at trial. He confirmed his understanding that nothing he said could be used against him, even if he were to be tried for murder, but that if he testified truthfully, he would thereafter receive a three-year sentence for being an accessory after the fact, and he would not be tried for murder. On the other hand, he also understood that if he testified falsely he could be tried for perjury. The prosecutor argued that the agreement called for Rusich's truthful testimony.[18]

Defendant argues that the agreement violated his constitutional rights because "the order as signed by [the] judge . . . , does not contain, within its conditions any requirement that Rusich testify truthfully at trial." Thus, he claims, Rusich was not prohibited from committing perjury, nor the prosecutor from suborning it. Further,

[18] The prosecutor argued: "You will of course hear, as you should, attacks on Mr. Rusich for getting a deal in this case, a very distasteful deal for the prosecution to do, I agree . . . . [¶] The deal you will get. . . . It's all written down, signed by Judge Brown on May 20th, the day before Mr. Rusich was interviewed and lays out the terms, the structure. And the deal is he has to testify truthfully."

defendant argues that we may not look any further than the four corners of the order to determine what the terms of the agreement were.

We do not read the order as narrowly as defendant does. It is true that the order did not say transactional immunity would be granted "upon the condition that he testifies *truthfully* as a witness at trial," but the requirement of truthful testimony was implicit in the order as a whole. First, in exchange for his providing information to law enforcement, Rusich was irrevocably granted use and derivative immunity only, which protected him in the event that he was prosecuted for any of the crimes under investigation. He was only granted transactional immunity, and an extremely advantageous plea bargain, if he fulfilled two further conditions: (1) the information he gave was truthful, in the opinion of the District Attorney's Office, after a complete investigation and (2) he testified as a witness at trial. Finally, if he did not testify truthfully, he could be prosecuted for perjury. In our view, these conditions taken together with the perjury admonition clearly signaled that Rusich was required to testify truthfully at trial by the agreement and the order ratifying it.

Our reading of the order is supported by two extrinsic aids. First, the District Attorney's petition, on which the order was premised, requested immunity in exchange for Rusich's truthful testimony. Second, Rusich's testimony confirmed his understanding that the agreement required his truthful testimony. Defendant's objection notwithstanding, our Supreme Court has itself looked to the defendant's testimony as to his or her understanding of the immunity agreement to assess whether constitutional error has occurred. (See *People v. Fields* (1983) 35 Cal.3d 329, 359; *People v. Garrison* (1989) 47 Cal.3d 746, 768.) We also think it is relevant that the prosecutor staked his argument to the jury on the truthfulness required of Rusich by the plea agreement.

While the order at issue here may not have been as explicit at it could have been, its circumspection nevertheless had the virtue of avoiding the main vices of immunity agreements identified in the case law as inimical to a fair trial. The immunity order here

did not, for example, place Rusich " 'under a strong compulsion to testify in a particular fashion' " or require that his testimony "substantially conform to an earlier statement given to police." (*People v. Gurule* (2002) 28 Cal.4th 557, 615, citations omitted.) Likewise, since the order did not threaten reinstatement of the murder charges if Rusich failed to testify in accordance with his prior statements to the police, Rusich was not "fettered in his testimony and put in so dire a position that the value of his evidence was not capable of appraisement, . . ." (*People v. Medina* (1974) 41 Cal. App.3d 438, 453-454.) We discern no constitutional defect in the immunity agreement or the order memorializing it. Accordingly, defense counsel was not ineffective for failing to object to it.

F. Modification of the Judgment to Strike Two Multiple-Murder Special Circumstances

The People charged, and the jury found, three multiple-murder special circumstances, one for each murder victim. Defendants argue, and the People concede, that two of the three multiple-murder special-circumstance findings by the jury should be stricken. (*People v. Kimble* (1988) 44 Cal.3d 480, 504; § 1260 [court may modify judgment]; *People v. Allen* (1986) 42 Cal.3d 1222, 1273.) *Kimble* and *Allen* hold that the information "should allege one multiple murder special circumstance relating to all individual murder counts." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1273.) Therefore, we order that the judgment be modified to reflect imposition of one multiple-murder special-circumstance finding per defendant.

CONCLUSION

For the reasons discussed above, we reject all but one of defendants' numerous assignments of evidentiary, instructional, ineffective assistance of counsel and prosecutorial misconduct errors. The People concede, and we agree, that only one

multiple-murder special-circumstance finding applies to each defendant. Therefore, we will order the remaining multiple-murder special circumstances stricken.

DISPOSITION

As to each defendant, two of the three multiple-murder special-circumstance findings are ordered stricken. The trial court is directed to amend the abstracts of judgment accordingly. As modified, the judgment is affirmed.

_____
McAdams, J.

WE CONCUR:

_____
Rushing, P.J.

_____
Premo, J.